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No. 07-__

IN THE

Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC. AND ST. PAUL SURPLUS LINES,
Petitioners,

v.

DEVON LOUISIANA CORP. AND PETRA CONSULTANTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fifth Circuit held that a contract to perform repairs on a platform permanently attached to the seabed was a maritime contract, and that an indemnity claim arising out of that work was therefore governed by maritime law. In reaching this conclusion, the court applied a test devised in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990) that looks at each item of work performed under a contract separately, and focuses in large part on the location of the incident giving rise to the indemnity claim. The Second and Ninth Circuits have held that this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) mandates a "global" approach that forecloses the notion that portions of a contract can be viewed in isolation, and requires a "conceptual" rather than a "spatial" approach to determining whether a contract is maritime.

*Did the Fifth Circuit err in applying a pre-*Kirby *test that focuses on severable portions of a contract in isolation, and in large part focuses on situs rather than on whether the subject matter of the contract is maritime commerce?*

LIST OF PARTIES

Petitioners are Magnolia Industrial Fabricators, Inc. and St. Paul Surplus Lines, who are defendants in the district court suit and appellants in the interlocutory appeal at issue.

Petra Consultants, Inc. also was a defendant in the district court and appellant in the Fifth Circuit, but has not joined in this Petition. As such, Petra Consultants, Inc. is technically a "Respondent" in this Court. *See Rake v. Wade*, 508 U.S. 464, 466 n.1 (1993).

Respondent is Devon Louisiana Corporation, who was the plaintiff in the district court and appellee in the Fifth Circuit.

Four other parties were defendants in the district court, but did not participate in the interlocutory appeal in the Fifth Circuit: Gulf Fleet Marine, Inc., Abdon Callais Offshore, LLC, Continental Insurance Co., and Boston Old Colony Insurance Company.

Harry Thomas was a party to the case before it was severed into a different cause, but is not now a party to the case on appeal.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, counsel for the Petitioners state:

Magnolia Industrial Fabricators, Inc. is a non-governmental party to this action that does not have a parent company, and no publicly-held corporation owns ten percent or more of its stock.

St. Paul Surplus Lines is now part of the Travelers group of affiliated insurance companies, which have been consolidated as part of The Travelers Companies, Inc. The Travelers Companies, Inc. is a publicly-held corporation traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Magnolia Industrial Fabricators, Inc. and St. Paul Surplus Lines pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on September 13, 2007, which affirmed a judgment of the United States District Court for the Southern District of Texas, Galveston Division filed February 9, 2005.

OPINIONS BELOW

The district court's judgment was not published. Apx. at 1a-8a. The *per curiam* opinion of the Fifth

Circuit (Apx. at 9a-23a) was not designated for publication, but can be found on Westlaw at 2007 WL 2693647. The Fifth Circuit denied a petition for rehearing en banc through an unpublished order. Apx. at 24a-26a.

JURISDICTION

The court of appeals had jurisdiction over this interlocutory appeal because of 28 U.S.C. § 1292(a)(3), governing appeals from "interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *See* Apx. at 14a-15a. The court of appeals' judgment was entered on September 13, 2007. Apx. at 9a. A timely petition for rehearing en banc was denied on October 12, 2007. Apx. at 24a. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents a conflict between the decision of the Fifth Circuit below and decisions of the Second and Ninth Circuits regarding the proper test for determining whether a contract is a maritime contract subject to the admiralty and maritime jurisdiction of the United States courts and governed by maritime law. The Second and Ninth Circuits have held that this issue is determined by applying this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) ("*Kirby*"), and that prior jurisprudence must be reevaluated in light of that decision. Without even referring to *Kirby*, the Fifth Circuit held that the question of whether a contract for services in the offshore oil industry is a maritime contract is determined by applying the test devised in

Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313 (5th Cir. 1990).

The suit arises out of an injury to an oilfield worker, Harry Thomas. Apx. at 12a. Mr. Thomas was employed by Magnolia Industrial Fabricators, Inc. ("Magnolia"). *Id.* Magnolia had entered into a "Master Service Agreement" with Devon Louisiana Corporation ("Devon"). Apx. at 11a. A Master Service Agreement is a contract between an oil company and a service contractor that sets forth the terms and conditions under which work will be done if and when the oil company needs the service contractor's services.

The Master Service Agreement between Devon and Magnolia contained a provision that required Magnolia to indemnify Devon if one of Magnolia's employees was injured and sued Devon. Apx. at 11a. It also required Magnolia to have Devon named as an additional assured on the liability policy issued by St. Paul Surplus Lines ("St. Paul"). *Id.*

Oil companies like Devon will typically have operations on land, on wells located on fixed platforms attached to the seabed of the Gulf of Mexico, and will also conduct drilling activities from mobile drilling units that are considered vessels. In recognition that some of the services that Magnolia could perform for Devon might involve maritime activities, and some might not, the Master Service Agreement contained a provision that provided that the contract "shall be governed by the General Maritime laws of the United States," but that "in the event it is ever judicially determined that the General Maritime laws of the United States are inapplicable, then this contract shall be governed by the laws of the State of Louisiana." *See* Apx. at 22a.

This suit arose out of a job that Magnolia was to do on a fixed platform used to produce hydrocarbons. Apx. at 10a-11a. The platform was permanently attached to the seabed, and as such, is considered to be "land"—that is, it is an artificial island instead of a vessel.[1] Devon directed Magnolia to send a crew to the platform to perform repairs to the platform. Apx. at 11a. While the Magnolia crew was to travel to the platform on a boat, both parties anticipated that all of the work was going to be done on the platform itself, and that no work would be done on the vessel. Apx. at 11a, 18a. However, when the boat and crew arrived at the platform, they discovered that someone had neglected to obtain a "hot work" permit, and so the welding had to be done on the deck of the boat. *Id.* Nonetheless, of the work that was completed, all the work except for welding was done on the platform. Apx. at 4a.

Mr. Thomas was injured on the boat while putting away equipment. Apx. at 12a. He sued Devon and other parties. *Id.* Devon in turn filed a third party complaint against Magnolia and St. Paul, claiming that Magnolia was obligated to indemnify Devon under the Master Service Agreement and that St. Paul owed Devon insurance coverage. *Id.* These claims would be valid under the maritime law, but neither would be valid under the Louisiana Oilfield Indemnity Act. *See* Apx. at 13a. Accordingly, this case presents the question whether the contract was a maritime contract governed by maritime law, or a non-maritime contract governed by Louisiana law as

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[1] *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 497 (5th Cir. 2002).

per the terms of the choice of law provision in the Master Service Agreement.

Both the district court and the Fifth Circuit concluded that the contract to repair the fixed platform was a maritime contract governed by maritime law. Apx. at 6a, 10a, 22a. In reaching this conclusion, both courts relied on *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990). *Id.*

REASONS FOR GRANTING THE PETITION

This case involves an issue important to the uniformity of federal admiralty jurisdiction jurisprudence. The Second and Ninth Circuits have recognized that the question of whether a contract is a maritime contract is governed by this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), and that this decision requires a reevaluation of prior maritime contract jurisdiction decisions. The Fifth Circuit's decision, on the other hand, completely ignored *Kirby*, and applied a pre-*Kirby* methodology that is contrary to both the letter and spirit of *Kirby*. The Fifth Circuit's methodology not only makes it impossible for parties engaged in oilfield activities to know the extent of their rights and obligations, but seriously disrupts the uniformity of federal admiralty jurisdiction jurisprudence.

I. THE TOUCHSTONE: *NORFOLK S. RY. CO. V. JAMES N. KIRBY, PTY LTD.*

In *Kirby*, this Court held that a through bill of lading calling for ocean transportation from Australia to Savannah, and subsequent land transportation from Savannah to Huntsville, Alabama was a maritime contract. In reaching this conclusion, the Court stated the following principles:

1. "[T]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—[are] conceptual rather than spatial."[2]
2. The question of whether a contract is maritime "depends upon . . . the nature and character of the contract."[3]
3. The "true criterion is whether [the contract] has 'reference to maritime service or maritime transactions.'"[4]
4. The "fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'"[5]
5. The conceptual approach requires the court to "focus . . . [the] inquiry on whether the principal objective of a contract is maritime commerce."[6]
6. "If a [contract's] sea components are insubstantial, then the [contract] is not a maritime contract."[7]

II. APPLICATION OF *KIRBY* BY THE SECOND AND NINTH CIRCUITS

Though these principles set forth in *Kirby* were drawn from prior jurisprudence, both the Second and

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[2] 543 U.S. at 23, *quoting Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961).

[3] 543 U.S. at 24, *quoting N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919).

[4] *Id.*

[5] 543 U.S. at 25 (emphasis in original), *quoting Exxon Corp. v. Central Gulf Lines*, 500 U.S. 603, 608 (1991).

[6] 543 U.S. at 25.

[7] 543 U.S. at 27 (emphasis in original).

Ninth Circuit have recognized that *Kirby* creates a new distinction between "conceptual" and "spatial" approaches[8] that extends beyond prior case law, and requires reevaluation and reversal of prior decisions.

Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.[9] presented the question whether a policy of liability insurance issued to a company that cleaned the tanks of coastal and ocean-going vessels was a policy of marine insurance subject to the court's admiralty jurisdiction and governed by the marine insurance law doctrine of utmost good faith. The Second Circuit first addressed its own decisions that had held that in determining whether a contract was subject to admiralty jurisdiction and maritime law, the court must first make a "'threshhold inquiry' into the subject matter of the *dispute*."[10] While not directly overruling these cases, the court questioned "the extent to which this Court's threshold inquiry survives the Supreme Court's most recent admiralty decision [*Kirby*]."[11] As we shall see, the Fifth Circuit's methodology involves an inquiry very similar to the "threshold inquiry" the Second Circuit saw as conflicting with *Kirby*.

The *Folksamerica* court next addressed the rule in its jurisprudence whereby a court could exercise admiralty jurisdiction over a contract if the non-maritime elements were "merely incidental" to the maritime ones. *Id.* at 314. The court found that this approach was inconsistent with what it described as the "global principle" mandated by *Kirby*, whereby

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[8] 543 U.S. at 25-27.

[9] 413 F.3d 307 (2d Cir. 2005).

[10] *Id.* at 312 (emphasis in original).

[11] *Id.* at 313.

the focus is on "whether the principal objective of the contract is maritime commerce."[12] As we shall see, the Fifth Circuit's methodology is similarly inconsistent with this "global principle."

In *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*,[13] the Ninth Circuit similarly concluded that *Kirby* had undercut prior maritime contract jurisdiction jurisprudence and required a different analysis. There, the question was also whether an insurance policy that insured both marine and non-marine risks was a maritime contract within the court's jurisdiction and governed by the federal marine insurance doctrine of utmost good faith. According to the Ninth Circuit, under *Kirby* "the dispositive inquiry must be 'whether the principal objective of [the] contract is maritime commerce.'"[14] Then, the court concluded that the "primary objective test" was incompatible with prior cases that had held that admiralty jurisdiction and maritime law could apply to "severable" maritime obligations in a contract that was predominantly non-maritime: "We find that our 'severability' exception collapses in the wake of the *Norfolk* Court's conceptually based 'primary objective' test."[15] As we shall see, the Fifth Circuit's decision ignores the question of whether the primary objective of the contract is maritime commerce, and the *Davis & Sons* test it used to reach that conclusion is by definition a version of the "severability" test.

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[12] *Kirby*, 543 U.S. at 25.

[13] 481 F.3d 1208 (9th Cir. 2007).

[14] *Id.* at 1218, *quoting Kirby*, 543 U.S. at 25.

[15] *Id.*

III. THE FIFTH CIRCUIT'S *DAVIS & SONS* TEST IS IRRECONCILABLE WITH THE SECOND AND NINTH CIRCUIT DECISIONS

One of the most frequently recurring and frequently litigated issues in states with offshore oil operations is whether a contract for services is a maritime contract subject to federal admiralty jurisdiction and federal maritime law, or a non-maritime contract governed by state law.[16] The question typically arises in indemnity disputes like the one presented here, because maritime law differs significantly from the laws of both Texas and Louisiana over the enforceability of indemnity agreements whereby a contractor is asked to indemnify its cus-

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[16] For instance, since *Davis & Sons*, reported cases involving this issue have included *Thibodeaux v. Vamos*, 487 F.3d 288 (5th Cir. 2007); *Hoda v. Rowan Companies, Inc.*, 419 F.3d 379 (5th Cir. 2005); *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002); *Roberts v. Energy Development Corp.*, 235 F.3d 935 (5th Cir. 2000); *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474 (5th Cir. 1993); *Hollier v. Union Tex. Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992); *Smith v. Penrod Drilling Corp.*, 960 F.2d 456 (5th Cir. 1992); *Alleman v. Omni Energy Services Corp.*, 434 F. Supp. 2d 405 (E.D. La. 2006); *Lockerman v. Global Santa Fe Drilling Co.*, 213 F. Supp. 2d 778 (S.D. Tex. 2002); *Tullos v. Cal Dive Intern., Inc.*, 188 F. Supp. 2d 709 (S.D. Tex. 2002); *Verdin v. Ensco Offshore Co.*, 104 F. Supp. 2d 682 (W.D. La. 2000), *aff'd*, 255 F.3d 24 (5th Cir. 2001); *Certain Underwriters at Lloyds, London v. Oryx Energy Co.*, 957 F. Supp. 930 (S.D. Tex. 1997), *rev'd on other grounds*, 142 F.3d 255 (5th Cir. 1998); *Scott v. DelMar Offshore Servs., Inc.*, 943 F. Supp. 764 (S.D. Tex. 1996); *Wagner v. McDermott, Inc.*, 899 F. Supp. 1551 (W.D. La. 1994), *aff'd*, 79 F.3d 20 (5th Cir. 1996); and *Teledyne Movable Offshore, Inc. v. Leasco Fleeting & Barge Service, Inc.*, 827 S.W.2d 633 (Tex. App.—Beaumont 1992, writ denied).

tomer for the customer's own negligence. Under maritime law, these agreements are generally enforceable so long as the indemnity provision is clear and unequivocal, whereas both Texas and Louisiana have statutes that severely limit the enforceability of such provisions.[17] In short, the question presented by this case has been and will continue to be a recurring subject of litigation in states with offshore oil production so long as the law is uncertain.

In *Davis & Sons*, the Fifth Circuit attempted to come up with a test that would assist parties and courts in answering this question. As was the case here, the work was done under a "Master Service Agreement" that envisioned that the oil company would from time to time require the services of the contractor. The contractor argued for the application of state law, asserting that since 70% of the work the contractor had done under the Master Service Agreement was land-based, the contract should be considered non-maritime in nature. The Fifth Circuit rejected this argument, holding that "this does not foreclose the application of maritime law to the work orders applicable to some or all of the 30% vessel-based services as maritime obligations rendered pursuant to the contract for these services."[18]

This notion that each job performed under the Master Service Agreement should be considered a separate contract is irreconcilable with both the Second Circuit's conclusion that *Kirby* mandated a "global principle" and the Ninth Circuit's conclusion that *Kirby* had overruled cases that had held that

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[17] *See Hoda*, 419 F.3d at 380; LA. REV. STAT. ANN. § 9:2780; TEX. CIV. PRAC. & REM. CODE § 127.003.

[18] 919 F.2d at 316.

maritime jurisdiction and law could apply to the "severable" maritime obligations in a contract that was principally non-maritime. In both *Folksamerica* and *Sentry Select*, application of the *Davis & Sons* rule would have required the court to look to the particular insurance claim being made rather than the contractual relationship between the parties as a whole. Instead, those courts read *Kirby* as requiring a determination of whether the contract as a whole was maritime or not, not whether particular parts of the contract or particular claims could be viewed as maritime.

Having concluded that it should look to each individual job instead of the contract as a whole to determine whether work performed under the Master Service Agreement was maritime, the Fifth Circuit in *Davis & Sons* then proceeded to formulate a test to determine whether the particular work order was maritime or not. According to the Fifth Circuit, this required consideration of the following factors:

1. What does the specific work order in effect at the time of the injury provide?
2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?

6. What work was the injured worker actually doing at the time of the injury?[19]

These factors are on their face irreconcilable with the Second and Ninth Circuit decisions.

In *Folksamerica*, the Second Circuit strongly suggested that its prior cases requiring a "'threshhold inquiry' into the subject matter of the *dispute*" were irreconcilable with the "global principle" enunciated in *Kirby*. On the other hand, the requirement set forth in *Davis & Sons* that the court consider the work actually done by the crew, the "principal work of the injured worker," and "what work . . . the injured worker [was] actually doing at the time of the injury" are by their very nature dispute-specific; they focus attention on facts unique to the particular dispute, not on "whether the principal objective of [the] contract is maritime commerce."

Moreover, these factors by necessity are based upon a notion of "severability" expressly rejected by the Ninth Circuit in *Sentry Select*, in that they suggest that a different result may obtain depending upon which worker is injured and what that particular worker is doing when injured. *Davis & Sons* thus creates the potential for disparate treatment of different aspects of the same job, whereby an indemnity claim relating to a worker doing non-maritime work injured on land would be governed by different law than an indemnity claim relating to a worker who is working on a vessel at the time of injury. This possibility of an unpredictable jurisdictional matrix that is constantly changing during the course of a job as workers change tasks and location is inherently inconsistent with the conclusion of the Second and

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[19] *Id.* at 316.

Ninth Circuits that the jurisdictional question should be answered by looking at the contract as a whole.

The *Davis & Sons* inquiry into whether "the crew [was] assigned to work aboard a vessel in navigable waters" is similarly a "spatial" inquiry at odds with the "conceptual" focus of *Kirby* as interpreted by the Second and Ninth Circuits: "To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute";[20] "Geography . . . is useful only in a limited sense: If a bill's *sea* components are insubstantial, the bill is not a maritime contract."[21]

The question of whether the crew contributed to the mission of the vessel could be conceivably help in determining "whether the principal objective of [the] contract is maritime commerce," as could the question of "what does the specific work order in effect at the time of the injury provide?" As we shall see, however, in this case the Fifth Circuit interpreted this aspect of the *Davis & Sons* test to make the inquiry "dispute" oriented rather than "global," and "spatial" rather than "conceptual."

IV. *DAVIS & SONS* AS APPLIED IN THIS CASE IS IRRECONCILABLE WITH THE SECOND AND NINTH CIRCUIT DECISIONS AND WITH *KIRBY* ITSELF

In concluding that the contract between Devon and Magnolia was a maritime contract, the Fifth Circuit interpreted *Davis & Sons* in a way that brings the law of the Fifth Circuit into even more stark contrast with its sister circuits. As noted above, the first

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[20] 413 F.3d at 313 (*quoting Kirby*, 543 U.S. at 23).

[21] 481 F.3d at 1219 (*quoting Kirby*, 543 U.S. at 27).

Davis & Sons question is "What does the specific work order in effect at the time of the injury provide?" The principal point of contention in the case was "whether the *Davis* factors should be analyzed in terms of what the parties expected would happen, or rather in terms of what actually happened during performance of the contract." Apx. at 19a. The Fifth Circuit came down squarely on the side of actual performance rather than the expectations of the parties:

> The Davis factors primarily address the nature and character of the contract as it was actually executed; that conclusion finds support in the specific language of the factors themselves . . . . [Even] the first factor . . . analyzes the specific work order "in effect at the time of injury," thus possibly contemplating that the work order "in effect" when the injury occurred could be different from the parties' *ex ante* expectations.

Id. at 20a.

While this may have been a reasonable interpretation of *Davis & Sons* itself, it is irreconcilable with *Kirby* as interpreted by the Second and Ninth Circuits, since focusing on the work that is actually done focuses on the particular dispute rather than on the contract as a whole. The Fifth Circuit's opinion even goes so far as to point out that while "some [work] was performed on the fixed platform, . . . all the welding work was performed on [the vessel]." Apx. at 12a. In point of fact, the welding was the only task that was performed on the vessel, Apx. 4-5a, and the Fifth Circuit's fixation on how one particular task was in fact performed cannot be considered viewing the contract "globally" as required by the Second and Ninth Circuits.

This focus on actual performance is also by necessity a spatially focused inquiry. Here, Mr. Thomas was expected to work on the platform, but the fact that he did the same work on the vessel led to a different result. Both the Second and Ninth Circuits recognized that the location of the work and the place of injury is largely irrelevant. "Geography . . . is useful only in a limited sense: If a bill's *sea* components are insubstantial, the bill is not a maritime contract."[22] As this Court stated in *Kirby*, "we cannot look to whether a ship or other vessel was involved in the dispute . . . [n]or can we simply look to the place of the contract's . . . performance."[23] Instead, the question is what was the "nature and character" of the work, and "whether the principal objective of [the] contract is maritime commerce." The Fifth Circuit's focus on what was actually done and where it was done cannot be reconciled with the Second and Ninth Circuit's decisions.

The conflict between the ruling below and the interpretation given *Kirby* by the Second and Ninth Circuits is highlighted when one considers how those cases would have been decided under the two approaches with a slight variation in the facts. The plaintiff in *Folksamerica* was injured on a vessel, but under the Second Circuit's application of the "global principle" it thought was mandated by *Kirby*, it would have made no difference to the outcome if the worker had happened to have been injured on land—the insurance policy at issue principally insured maritime risks, and was hence a maritime contract. Similarly, *Sentry Select* arose out of a claim by a Jones

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[22] *Id.*; *see also* 413 F.3d at 313 (*quoting Kirby*, 543 U.S. at 23).

[23] 543 U.S. at 23-24.

Act seaman who was injured on land, but it would have made no difference if he had been injured at sea, since the insubstantial maritime risk insured under the excess/umbrella policy at issue could not under *Kirby* be severed from the overwhelmingly non-maritime remainder of the policy. Under the holding of the Fifth Circuit here, however, focusing on what actually occurred would probably have compelled a different result.

The Fifth Circuit apparently concluded that the only jurisprudence that it needed to consider to determine whether an oilfield service contract was a maritime contract subject to federal admiralty jurisdiction and maritime law was *Davis & Sons*, and that *Kirby* was irrelevant to this question. This approach is in irreconcilable conflict with the Second and Ninth Circuits, both of which concluded that while *Kirby* on its facts involved carriage of goods under intermodal bills of lading, this Court was setting forth a rule of general application to the question of maritime contract jurisdiction. The Fifth Circuit's apparent conclusion that *Kirby* is of limited application and does not effect the Fifth Circuit's maritime contract jurisdiction jurisprudence in the context of oilfield service contracts is at loggerheads with Second and Ninth Circuit's conclusion that *Kirby* set forth a rule of general application.

V. THE RAMIFICATIONS OF A SPLIT IN THE CIRCUITS

The Fifth Circuit's application and extension of *Davis & Sons* is a matter of extreme practical and jurisprudential importance. As pointed out above, the precise issue presented in this case of how one determines whether a contract for services in the offshore oil industry is a maritime contract is a mat-

ter that has plagued the industry for decades.[24] Admittedly, there is probably no simple test to use to answer this question, but the test set forth by this Court in *Kirby*—"whether the principal objective of [the] contract is maritime commerce"—is clearly better than a test that can be manipulated to convert a contract to do repair work on "land" (a fixed platform) into a maritime contract. If the Fifth Circuit rule that has its genesis in *Davis & Sons* and culminates in the decision below is allowed to stand, the issue will continue to be litigated *ad infinitum*, and service contractors, their oil company customers and the insurers that insure them both will be continue to be unable to evaluate their risks and operate their business efficiently.

But the Fifth Circuit's decision has implications well beyond the offshore oil and gas industry. The failure even to cite *Kirby* suggests that the Fifth Circuit believes the *Kirby* is not intended for general application, leaving open the possibility that it would take a pre-*Kirby* approach to determining whether a broad spectrum of contracts were subject to federal jurisdiction and law. Moreover, if the offshore oil and gas industry is to be carved out of the application of *Kirby*, what other exceptions might there be? Offshore activities are expanding to include new technologies such as offshore windfarms for the generation of electricity; will the jurisdictional question with respect to contracts in use in other industries be decided by using a single standard designed to limit federal jurisdiction to core maritime concerns, or will the issue be decided by industry-specific standards? In *Kirby*, this Court reiterated that the underlying purpose of vesting the federal courts with admiralty

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[24] *See supra* page 9, note 16.

jurisdiction and the creation of a body of specialized rules of maritime law is the national interest in protecting maritime commerce, and Petitioners submit that this national purpose is ill-served by applying different rules to determine whether particular types of contracts or contracts used in particular industries need a uniform treatment. Petitioners submit that this Court should grant certiorari to determine whether the Fifth Circuit's approach is compatible with the interpretation given *Kirby* by the Second and Ninth Circuits, and with the decision of this Court in *Kirby* itself.

CONCLUSION

This Court should hold that the Fifth Circuit's *Davis & Sons* test cannot survive this Court's decision in *Kirby*. Based on that holding, this Court should grant the Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit and Southern District of Texas, and remand for further proceedings under the *Kirby* standard.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

[Filed Feb. 09, 2005]

CIVIL ACTION NO. G-04-657

DEVON LOUISIANA CORPORATION, *et al.*,
Plaintiffs,

v.

PETRA CONSULTANTS, *et al.*,
Defendants.

ORDER DENYING IN PART AND GRANTING IN PART MAGNOLIA INDUSTRIAL FABRICATORS, INC.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART DEVON LOUISIANA CORPORATION'S MOTION FOR SUMMARY JUDGMENT

This lawsuit concerns claims for defense and indemnity arising out of claims by Harry Thomas, an employee of Magnolia Industrial Fabricators, Inc. ("Magnolia"). Now before the Court comes the Motion for Summary Judgment by Magnolia and the Motion for Summary Judgment by Devon Louisiana Corporation ("Devon"). For the reasons stated below, Magnolia's Motion is GRANTED IN PART and DENIED IN PART, and Devon's Motion is GRANTED IN PART. The Court does not yet reach Devon's Motion as it applies to Petra Consultants, Inc.

I. Background

Harry Thomas, Jr. ("Thomas"), an employee of Magnolia, filed suit as a result of injuries allegedly sustained while working aboard the M/V PETER CALLAIS, a vessel owned by Abdon Callais Offshore, LLC ("Abdon Callais"). Devon had a Master Service Agreement with Magnolia for Magnolia to provide maintenance for Devon's offshore oil and gas production platform. Devon also had a Master Service Agreement with Petra Consultants, Inc. ("Petra") for Petra to provide supervisors for the work done on the platform. Devon had another agreement with GulfFleet Marine, Inc. ("GulfFleet") to provide transportation and accommodations for the workers. GulfFleet did not have a vessel available for the trip in question, so it arranged for Abdon Callais to provide a vessel.

Thomas went out on the PETER CALLAIS as part of a Magnolia crew. The crew was supervised by a Petra employee, Herbert Mouton. Thomas alleged that he was injured when a wave hit him as he was on the deck of the vessel untying a tag line. Thomas testified in his deposition that he performed all his work on the vessel and that he never went on the platform.

This Court severed Thomas's claims from the claims and cross-claims for defense and indemnity. The underlying case recently settled, with Petra and Abdon Callais funding the settlement.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d

265 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The non-moving party must come forward with "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e), *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The court must view all evidence in the light most favorable to the non-movant. *See, e.g., Broussard v. Parish of Orleans*, 318 F.3d 644, 650 (5th Cir. 2003), *cert. denied*, 539 U.S. 915, 123 S. Ct. 2276, 156 L. Ed. 2d 130 (2003). If the evidence would permit a reasonable fact finder to find in favor of the non-moving party, summary judgment should not be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

III. Analysis

The Master Service Agreement ("MSA") between Magnolia and Devon provides that Magnolia must indemnify Devon from any claims arising out of the work performed by Magnolia, even if those claims arose from Devon's own negligence. The MSA also requires Magnolia to have Devon named as an additional insured on a comprehensive general liability insurance ("CGL") policy. Magnolia obtained such a policy from St. Paul Surplus Lines ("St. Paul") with an "additional protected persons" clause, which stated that any person or organization that Magnolia agreed in a written contract to add as an additional insured would be a protected person. The MSA's choice of law provision provides that general maritime law will

govern, but that if maritime law is ever found inapplicable, then Louisiana law will apply.

Devon claims that Magnolia owes it indemnity under the MSA and that Magnolia breached its contract by failing to provide the proper insurance. Magnolia claims that maritime law does not apply to the contract and that Louisiana law invalidates both the indemnity and insurance provisions, but that in any case, it did have Devon named as an additional insured on the policy from St. Paul. Magnolia also argues that because Gulf Fleet and its insurer provided Devon defense and indemnity in this case, Devon has no damages.

A. Choice of Law

Whether the indemnity and insurance provisions in the MSA are valid depends on whether the contract is governed by maritime law. In *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1991), the Fifth Circuit set out the factors used in characterizing a contract as maritime:

> 1) [W]hat does the specific work order in effect at the time of the injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters; 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker? and 6) what work was the injured worker actually doing at the time of injury?

In this case, the work order in effect at the time of the injury was a 21-item punch list of jobs to be done. Because of bad weather, the crew completed only some of the tasks. One of completed tasks, replacing the heliport skirting panel, was done on the vessel be-

cause of the lack of a hot work permit for the platform. (Williams Dep. at 78.) The rest were done on the platform. Magnolia argues that it anticipated that all work would be done on the platform, but that when the crew arrived, there was not a hot work permit for the platform so the welding jobs had to be done on the vessel. Mac Williams, the Magnolia supervisor, testified that all but two of the items would have been done on the platform had weather permitted the completion of the items on the list. (Williams Dep. at 78-85.) However, another company, Waveland Services, also sent a painting crew to do some of the work, so it is not clear from the record which items on the punch list would have been done by the Magnolia crew. (Enderlin Dep. at 27-28.) Also, comparing the number of jobs done on the platform to the number of jobs done on the vessel does not fully describe the situation; one job may have been far more substantial than all the rest.

Magnolia argues that the mission of the vessel was to provide transportation for the workers but not to serve as a work platform. Devon argues that the vessel was analogous to the barge in *Davis*, which served as a mobile work platform. Thomas testified that the boat had three welding machines which were used on this trip, but the platform had no welding machines. (Thomas Dep. at 46.) Certain fabrication work was done on the vessel using these machines. The workers also moved equipment on and off the vessel. Therefore, it appears that part of the vessel's mission was to aid in the platform repairs, and Thomas's work related to that mission. Also, while some of the workers performed work on the platform, they also worked on the vessel, indicating an assignment to work on a vessel in navigable waters.

Thomas testified that he never left the vessel, and while his supervisor testified that all of the jobs on the punch list would have been done on the platform if the proper permit had been obtained, it is not clear from the record that Thomas's job as a rigger would have actually been performed on the platform. (Thomas Dep. at 43.) Based on his testimony, it appears that he helped move equipment and parts from the vessel to the platform while remaining on the vessel. At the time of the incident, he was untying a tag line while on the vessel.

Much of Magnolia's argument depends on its contention that it did not expect any work to be performed on the vessel, and that those expectations, rather than the actual events, should control. However, Magnolia must have expected maritime law to apply to the MSA since it agreed that general maritime law would apply unless a court found it inapplicable. The MSA provided that Louisiana law would apply only as a second choice.

This Court finds that the *Davis* factors show the maritime nature of the contract between Devon and Magnolia. Additionally, the underlying complaint by Thomas was governed by admiralty law, which adds to the "salty flavor" of the case. *Davis*, 919 F.2d at 316 (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 81 S. Ct. 886, 894, 6 L. Ed. 2d 56 (1961)).

Because maritime law applies, the indemnity and additional insured provisions in the MSA between Devon and Magnolia are valid and enforceable. Magnolia must indemnify Devon according to the terms of the MSA, subject to the showing of damages by Devon, as discussed below.

B. Breach of Contract

Devon claims that Magnolia breached its contract to have Devon named as an additional insured on Magnolia's CGL policy. Magnolia has produced a CGL policy from St. Paul stating that whenever Magnolia agrees in a written contract to have another company listed as an additional insured, that company will be a protected person under the policy. The fact that St. Paul has not paid Devon any money under the policy does not indicate that Magnolia breached its contract with Devon but only that Devon has a dispute with St. Paul. Devon has not shown that a genuine issue of material fact exists as to whether Magnolia breached the contract. Therefore, the Court finds that Magnolia did not breach its contractual obligation to have Devon named as an additional insured on the CGL policy.

C. Damages

Magnolia argues that Devon's claim should be denied because Devon already received defense and indemnity from Gulf Fleet and its insurer. Devon must show actual out-of-pocket expenses to receive any funds from Magnolia under the indemnity provision in the MSA. This Order does not give Devon the right to double payment of its expenses in the underlying case; the Court does not intend to create a windfall for any Party.

IV. Conclusion

For the reasons stated above, Magnolia's Motion for Summary Judgment is DENIED as to Devon's claim for indemnity and GRANTED as to Devon's breach of contract claim. Devon's Motion for Summary Judgment is GRANTED as to the indemnity claim against Magnolia only. The Court does not yet reach any of

Devon's claims against other Parties. A Final Judgment regarding this and all other claims will be entered in due course.

IT IS SO ORDERED.

DONE this 8th day of February, 2005, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed September 13, 2007]

No. 05-40344

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.; *et al.*,
Defendants,

MAGNOLIA INDUSTRIAL FABRICATORS, INC.,
Defendant-Appellant.

No. 05-40347

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

ST. PAUL SURPLUS LINES,
Defendant-Appellant.

No. 05-40350

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Third-Party Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.,
Defendant-Third-Party Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
No. 3:04-CV-657

Before SMITH, GARZA, and OWEN, *Circuit Judges.*

PER CURIAM:*

Devon Louisiana Corporation ("Devon") seeks contractual indemnity from the defendants for costs incurred while defending a lawsuit for personal injuries sustained by a worker during repairs to Devon's offshore oil and gas platform. Defendants appeal an adverse interlocutory ruling that the contractual indemnity provision is valid and enforceable under maritime law. We affirm.

I.

Devon owns an offshore oil and gas production platform maintained and operated by independent

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

contractors. Devon had almost identical "Master Service Agreements" ("MSA's") with Magnolia Industrial Fabricators ("Magnolia") and Petra Consultants ("Petra"). The MSA's served as blanket agreements that are not complete by themselves and called for no specific work but contemplated that "from time to time" Devon would initiate a work order requesting that Magnolia and/or Petra "perform certain work or furnish certain services." Under the MSA's, Magnolia and Petra agreed to defend and indemnify Devon against all claims arising from work performed under the MSA's, and Magnolia and Petra were required to name Devon as an "additional insured" in a comprehensive general liability ("CGL") policy.

Magnolia named Devon as an "additional insured" on a CGL policy from St. Paul Surplus Lines ("St. Paul"), and Petra did the same on a policy from The Gray Insurance Co. ("Gray"). Devon had an additional MSA with Gulf Fleet Marine ("Gulf Fleet") under which Gulf Fleet was to provide vessel support services. The Devon/Gulf Fleet MSA required Gulf Fleet to provide defense, indemnity, and insurance for incidents arising out of the MSA.

Pursuant to the MSA's, a Magnolia crew was dispatched to complete a "punch list" of repairs to Devon's platform, and a Petra employee supervised the work. Gulf Fleet did not have an available vessel to support the repair crew, so it contacted Abdon Callais Offshore, L.L.C., the owner of the M/V PETER CALLAIS, to provide vessel support services; the crew was transported to the platform aboard the PETER CALLAIS. Some of the repairs required Magnolia to use welding equipment. Because there was no "hot work" permit, those fabrication and cutting procedures could not be performed aboard the

fixed platform; the welding equipment remained on the PETER CALLAIS, and the procedures were performed on the vessel.

The crew encountered inclement weather and was unable to complete all the items on the punch list. Of the work that was completed, some was performed on the fixed platform, but all the welding work was performed on the PETER CALLAIS. While moving heavy equipment on the PETER CALLAIS's deck, Harry Thomas, a rigger employed by Magnolia, was injured when a wave propelled him into some welding equipment.

II.

Thomas sued Devon and other parties for his injuries. Devon filed a third-party complaint against Gulf Fleet and its insurer, Boston Old Colony Insurance Company ("Boston Old Colony"), for breach of contract and insurance obligations under the Devon/Gulf Fleet MSA. Devon filed third-party complaints against Magnolia for breach of the insurance and indemnity provisions in the Devon/Magnolia MSA and against St. Paul for breach of its insurance obligations. Gulf Fleet and Boston Old Colony agreed to defend and indemnify Devon against Thomas's personal injury claims.

Devon, Gulf Fleet, and Boston Old Colony filed third-party claims against Petra for negligence and breach of its defense, indemnity, and insurance obligations under the Devon/Petra MSA; they also alleged that Boston Old Colony was subrogated to Devon's claims against Petra and that the failure of Petra's and Magnolia's insurance carriers (Gray and St. Paul, respectively) to indemnify Gulf Fleet and Boston Old Colony were breaches of the MSA's.

Petra then sought and obtained leave to file a counterclaim against Gulf Fleet and Boston Old Colony alleging that Gulf Fleet and Boston Old Colony breached a contract to provide insurance to Petra.

Magnolia and Petra separately moved for summary judgment seeking dismissal of Devon's claims for defense, indemnity, and insurance coverage. They argued that Louisiana law governs the contract and that the indemnity and insurance obligations are unenforceable under the Louisiana Oilfield Indemnity Act ("LOIA"), which provides, in part, that "any provision contained in . . . an agreement pertaining to a well for oil, gas, or water . . . is void and unenforceable to the extent that it purports to or does provide for defense or indemnity . . . to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons . . . ." LA. REV. STAT. ANN. § 9:2780(B) (2005).

Magnolia and Petra also moved for summary judgment on Devon's breach of contract claims regarding their obligation to have Devon named as an additional insured. Devon filed responses and filed cross-motions for summary judgment, arguing that the indemnity and insurance provisions were enforceable under maritime law and that summary judgment was appropriate for Devon's breach of contract claims regarding the "additional insured" provisions.

The district court granted in part and denied in part each summary judgment motion. The court found that Petra and Magnolia had not breached their contractual obligation to have Devon named as an additional insured; consequently, it granted Petra's and Magnolia's motions as to the "additional insured" breach of contract claims and denied Devon's motions on these claims. The court also found that

maritime law governs the MSA's and that the indemnity and insurance provisions are valid and enforceable. It therefore granted Devon's motion as to the indemnity and insurance claims and denied Magnolia's and Petra's motions on those claims.

St. Paul moved for summary judgment on Devon's claims that St. Paul had breached its contractual obligation to insure Devon. St. Paul argued (i) that the LOIA renders the "additional insured" provision unenforceable and (ii) that St. Paul does not owe Devon anything under Magnolia's CGL policy because Devon breached its contract with Magnolia by failing to reimburse Magnolia for the insurance premiums. The district court denied St. Paul's motion. It concluded that maritime law governs the MSA and that the additional insured provisions are therefore valid and enforceable. It also held that Devon's conduct did not breach the CGL policy between Magnolia and St. Paul and that St. Paul is therefore required to insure Devon as required by the policy.

In this interlocutory appeal, Magnolia, Petra, and St. Paul assert that the district court erred in concluding that maritime law governs the MSA's. They argue that the district court should have concluded that the MSA's are governed by Louisiana law, under which the defense, indemnity, and insurance provisions are void and unenforceable. St. Paul also asserts that it was entitled to summary judgment on Devon's breach of contract claim as to the "additional insured" provision in Magnolia's CGL policy. The appeals have been consolidated in this proceeding.

III.

Devon claims that this court does not have jurisdiction. The regional courts of appeals have jurisdic-

tion over "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(3) (2000). "Courts have tended to construe this provision rather narrowly and it has not been read to permit interlocutory appeals in admiralty except where the order, regardless of the label affixed to it had the effect of determining the rights and obligations of the parties." *In re Complaint of Ingram Towing Co.*, 59 F.3d 513, 516 (5th Cir. 1995). But it is "not necessary for all of the rights and liabilities of all of the parties [to] be determined" as long as "the order appealed from . . . conclusively determine[d] the merits of a claim or defense." *Associated Metals & Minerals Corp. v. ALEXANDER'S UNITY MV*, 41 F.3d 1007, 1010 (5th Cir. 1995) (internal quotations omitted).

The district court determined that "Magnolia [and Petra] must indemnify Devon according to the terms of the MSA" and that "St. Paul must insure Devon as required by the [CGL] policy." Even though there are unresolved issues affecting the parties' rights and liabilities, the district court's orders determined the rights and liabilities of the parties with respect to the primary indemnity and insurance claims at issue in these disputes. We therefore have jurisdiction over these interlocutory appeals, so we deny Devon's motion to dismiss for want of jurisdiction.

IV.

We review the denial of summary judgment *de novo*, using the same standards as did the district court. *Strong v. B.P. Exploration & Prod., Inc.*, 440 F.3d 665, 668 (5th Cir. 2006). The principal issue is whether the MSA's are governed by maritime law or

Louisiana law. Maritime law applies to contracts determined to be maritime in nature. Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry." *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990). We determine whether a contract is maritime by applying the six-factor test in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d at 316: "(1) [W]hat does the specific work order in effect at the time of injury provide? (2) what work did the crew assigned under the work order actually do? (3) was the crew assigned to work aboard a vessel in navigable waters? (4) to what extent did the work being done relate to the mission of that vessel? (5) what was the principal work of the injured worker? and (6) what work was the injured worker actually doing at the time of injury?" "The maritime or non-maritime status of the contract ultimately depends on its 'nature and character,' not on its place of execution or performance." *Hoda v. Rowan Co.*, 419 F.3d 379, 381 (5th Cir. 2005) (quoting *Davis*, 919 F.2d at 316).

A.

In some cases, the historical treatment in the jurisprudence may obviate the need for a fact-specific inquiry. Because, however, we have not previously considered whether a contract to repair a fixed platform is maritime, this first prong of the Davis analysis is inconclusive. Nevertheless, our cases dealing with offshore oil and gas contracts provide helpful suggestions on how the present case should be resolved.[1]

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[1] *Cf. Hoda*, 419 F.3d at 381 (5th Cir. 2005) ("*Davis*'s initial reference to the 'historical treatment in the jurisprudence,'

The defendants argue that a contract for the mere repair of a fixed platform cannot be maritime, because this court held in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co*, 754 F.2d 1223, 1231 (5th Cir. 1985), that a contract for the construction of a fixed offshore platform is not maritime. In *Laredo*, however, it was the plaintiff's failure to complete its contractual obligations to construct the platform that "gave rise to" the lawsuit. *Id.* We noted that the result might be different where the subject matter of a contract has a "direct relationship with . . . traditional subjects of maritime law." *Id.*

We also held in *Domingue v. Ocean Drilling & Exploration Co.*, 923 F.2d 393, 397 (5th Cir. 1991), that where a contract is only incidentally related to a vessel's mission, it is not maritime.[2] *Domingue* involved a contract for wireline services on an offshore well. *Id.* at 394. The work order required the crew to use a jack-up drilling rig. *Id.* Although a jack-up rig has been classified as a vessel for maritime law purposes,[3] in *Domingue* the use of a vessel was purely incidental to the execution of the contract, and nothing about the contract required that the contractor use a vessel instead of a mere work platform. *Id.* at 395, 397.

In contrast, the work in *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1123 (5th Cir. 1992),

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while inconclusive, is nonetheless suggestive, for present purposes.").

[2] *See also Laredo*, 754 F.2d at 1231 ("That the contract contemplated in part the use of instruments of admiralty . . . is not sufficient" to refrain from applying state law.).

[3] *See Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 537 (5th Cir. 1987).

required the use of a vessel as such. *Campbell* involved casing work that required the use of a vessel such as a jack-up rig, along with its derrick and draw works, because there was no fixed platform or derrick at the work site. *Id.* Similarly, in *Davis* we noted that the "particular nature of the terrain and production equipment required" the use of a vessel. *Davis & Sons, Inc., v. Gulf Oil Corp.*, 919 F.2d 313, 317 (5th Cir. 1990). *Davis* involved a work crew that traveled from one offshore job site to another and made various repairs to the offshore facilities and thus required a vessel "that could function as a mobile work platform." *Id.*

In *Hoda*, 419 F.3d at 379, 381, 383, we addressed an analogous situation in which the crew's "exact work did not require the use of [a] vessel," but the work "could not be performed without the [vessel's] direct involvement." *Hoda* involved the torquing up and down of the bolts on blowout preventer stacks, a task that by itself did not require the use of the vessel or its crew but that would have been irrelevant and impossible if the vessel's crew had not used the vessel's rig to set the stacks and bolts in place. *Id.* at 381.

The punch list required Magnolia's crew to make certain repairs to Devon's platform. Although the "exact work" on the punch list did not require the use of a vessel *per se*, the failure of the parties to obtain a hot work permit meant that the welding work, which was a prerequisite for completing some of the tasks on the punch list, had to be completed on a vessel, not the fixed platform. We deemed the wireline contract in *Domingue*, 923 F.2d at 397, non-maritime because the need for a vessel arose purely from the lack of a fixed platform. The contract here required that the

parties provide a vessel *per se*, because only a vessel working alongside the already existing fixed platform could provide a suitable place to perform the hot work. As was the case in *Davis, Campbell*, and *Hoda*, the instant contract required that a vessel be provided.[4]

It is undisputed that the hot work could have been completed on the oil and gas platform if the appropriate permit had been obtained. The inability to perform the hot work on the vessel was not caused by any physical or technical limitations but by the legal limitations resulting from the absence of a permit. That is, however, a distinction without a legal difference. *Hoda, Davis*, and *Campbell* do not require that the need for a vessel be caused by physical or technical limitations. There is no practical difference between having to use a vessel because of physical realities and having to use one because of legal restrictions. A vessel is required in both situations.

The jurisprudence therefore indicates that where the use of a vessel as such is required for completion of the contract, maritime law appropriately governs. We must now apply the six-factor *Davis* test to the facts.

B.

The parties ask us to consider whether the *Davis* factors should be analyzed in terms of what the parties expected would happen, or rather in terms of what actually happened during performance of the

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[4] *See also Demette v. Falcon Drilling Co.*, 280 F.3d 492, 500-01 (5th Cir. 2002) ("Even a contract for offshore drilling services that does not mention any vessel is maritime if its execution requires the use of vessels. This is true for contracts that may also involve obligations performed on land.").

contract. Magnolia claims the parties expected that all the work would take place on the fixed platform. According to defendants, we should apply the *Davis* factors to the facts as the parties intended them when the punch list was submitted pursuant to the MSA's. Defendants contend that an intent-based analysis would compel the conclusion that the contract is non-maritime and accordingly that Louisiana law applies. Devon, on the other hand, argues that the *Davis* factors must be applied to the facts as they actually occurred: Because some of the work was required to take place on a vessel, Devon says that that approach compels the conclusion that the contract is maritime, so maritime law should apply.

The Davis factors primarily address the nature and character of the contract as it was actually executed; that conclusion finds support in the specific language of the factors themselves. The second and sixth factors speak in terms of what "actually" happened in the performance of the contract. Factors three, four, and five use the past tense to analyze what kind of work "was" being done and how it was accomplished. Only the first factor—what does the specific work order in effect at the time of injury provide—uses language that could be interpreted as taking an *ex ante* view of the contract. But the first factor also analyzes the specific work order "in effect at the time of injury," thus possibly contemplating that the work order "in effect" when the injury occurred could be different from the parties' *ex ante* expectations.

Viewed in this way, the *Davis* factors suggest that the contract is maritime. Factor six weighs strongly in favor of finding a maritime contract, because the injured worker was engaged in the inherently maritime task of securing the vessel's cargo at the time of

injury. Similarly, factors two and five weigh in favor of finding a maritime contract, because there is no dispute that Thomas and the crew were required to use, and actually did use, the vessel *qua* vessel.

Regarding factor three, we agree with the district court's determination that when the vessel departed for the platform without the requisite permit, the crew was necessarily assigned to do some of its work on the vessel. Factor one asks us to evaluate the work order in effect at the time of the injury. Although the contract initially may have been contemplated as non-maritime because all of the work on the punch list could have been performed on the fixed platform, the work order as implemented by the parties required that they use a vessel to complete some of the required tasks.

Factor four requires us to analyze the relationship between the work performed and the mission of the vessel. We agree with the district court that part of the mission was to aid in the repairs to the platform. Some of that work required the vessel to convey people and cargo to the repair site, a task integral to completing the repairs. Thomas's work as a rigger, which involved loading and unloading cargo to and from the vessel, was certainly related to the transportation function of the vessel and contributed to the repair of the platform. Similarly, the hot work that took place on the vessel was "integral" in repairing the platform, a task that was part of the vessel's mission.[5] The *Davis* factors thus weigh in favor of finding that the contract is maritime.

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[5] *See Hoda*, 419 F.3d at 383 (citing *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 501 (5th Cir. 2002)).

Even if we were to adopt an approach that focused on the parties' *ex ante* expectations, we likely would reach the same result. The MSA's have a clause that states, "This Contract shall be governed by the General Maritime laws of the United States" unless it is judicially determined that such laws do not apply. That language indicates that the parties intended and expected that maritime law would apply. As we noted in *Hoda*, 419 F.3d at 380 n.3, "[o]ur conclusion that maritime law applies is consistent with the contract."

Because we conclude that maritime law applies to the MSA's, the indemnity provisions contained therein are valid and enforceable. We do not reach the issues of whether and to what extent Louisiana law applies.

V.

St. Paul raises the ancillary argument that, even if maritime law applies, St. Paul is not required to insure Devon pursuant to the additional insured provisions in the CGL policy between St. Paul and Magnolia. St. Paul contends it had no obligation to insure Devon because Devon breached its contract with Magnolia by failing to reimburse Magnolia for the insurance premiums.

St. Paul has abandoned this argument on appeal, because it has inadequately briefed it. St. Paul points to evidence in the record that Devon did not make premium payments; it uses that evidence primarily to urge that the additional insured provision is unenforceable under the LOIA. In addition, St. Paul includes one paragraph arguing that Devon is not entitled to additional insured coverage even if the LOIA does not apply:

> In the alternative, Devon is not entitled to additional insured coverage regardless of whether [LOIA] applies. Devon is not entitled to be named as an additional insured, because Devon breached its obligation to pay Magnolia for the additional insured coverage and, therefore, no such additional insured obligation existed.

This single paragraph with no citations to authority is insufficient to constitute an argument on appeal. We have consistently held that such arguments are abandoned for inadequate briefing. In *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir. 1994), we held that a party had abandoned a challenge because of inadequate briefing by citing "no authority in its one-page argument on the attorney fee question."[6] Similarly, in *Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006), we held that a party had inadequately briefed an issue because "he failed to cite any legal authority for the proposition that one has a constitutional right to have an executed search warrant filed under seal." We have also held that an argument consisting solely of one citation to an authority constituted inadequate briefing. *See Salazar-Regino v. Trominski*, 415 F.3d 436, 452 (5th Cir. 2005), *vacated on other grounds*, 127 S. Ct. 827 (2006).

In sum, maritime law applies to the MSA's, so we AFFIRM as to the defense, indemnity, and insurance issues raised on appeal, and we REMAND for further proceedings.

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[6] *See also In re Bouchie*, 324 F.3d 780, 786 (5th Cir. 2003) ("As Rush Truck cites no authority for this proposition, it is not adequately briefed and is therefore waived.").

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Entered Oct. 12, 2007]

No. 05-40344

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.; *et al.*,
Defendants,

MAGNOLIA INDUSTRIAL FABRICATORS, INC.,
Defendant-Appellant.

Consolidated with
No. 05-40347

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

ST. PAUL SURPLUS LINES,
Defendant-Appellant.

Consolidated with
No. 05-40350

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Third-Party Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.,
Defendant-Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas, Galveston

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 9/13/07, 5 Cir.,___, ___F.3d ___)

Before SMITH, GARZA, and OWEN, *Circuit Judges*.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified

not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

* Judge CLEMENT did not participate in the consideration of the rehearing en banc.